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No. 07-949

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SUPREME COURT, U.S.

In the Supreme Court of the United States

ROBERT WHITE, PRO SE,

Petitioner;

v.

JOSEPH B. COLLINS,
Chapter 7 Trustee for
CK LIQUIDATION CORP,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the First Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner, Robert White - pro se (hereafter "White"), hereby replies to Respondent's Opposition Brief (Respondent is the Chapter 7 Trustee in this bankruptcy case and appeal, hereafter the "Trustee").

The Trustee raises several procedural objections to White's F.R.C.P. 60(b)(4) Motion to Vacate the Sale Order (and thus to White's petition), and those objections must be defeated in this Reply Brief (or in the writ) before this Court can review White's questions presented in his writ of certiorari.

The Trustee complains that White's 60(b)(4) motion was late beyond reasonableness, because White waited two and a half years after the sale to file his motion to vacate the sale order. White's contends that his delay is reasonable, considering he has been pro se at all times after the bankruptcy court ratified the sale order, and at all times thereafter when the Trustee prosecuted White for sanctions and contempt (whereby White was incarcerated), which consumed two of those two and a half years after the sale, including White's appeals and writs taken against said sanctions, contempt, and incarceration.

The Trustee's own brief chronicles his proceedings against White in enough detail for this Court to realize that White was not idly sitting on his rights after the sale order was ratified. To the contrary, White was inundated responding against the Trustee's process, which included a three year avoidance recovery action which has still not concluded in the bankruptcy court and 42 days of incarceration for not being able to pay the bankruptcy court's $3,500 sanction. As the Trustee's brief clearly demonstrates on pages 9-12, White's appeal of the bankruptcy court's first sanctions took over two and a half years. That appeal sat in the First Circuit

Court of Appeals for over two years, from April 8, 2005 until July 27, 2007, without a stay or ruling.

The Trustee complains that White should have raised his instant property issue challenge in White's first 60(b) motion to vacate the sale order. However, White filed that particular 60(b) motion entirely in response to estate counsels' fee applications (estate counsel are the debtor's counsel, and creditors committee counsel, who is also the Trustee's counsel). White accused estate counsel of fraud after their fees consumed over half of the $750,000 they promised creditors as a dividend. White had a very limited amount of time to challenge those final fee applications. White did not have the intellectual or monetary resources to broaden the scope of his first 60(b) motion, which had a one year statute of limitations, whereas White's instant 60(b)(4) motion does not.

The Trustee also suggests that White should have included his property interest challenge within White's initial appeal of the sale order. White's petition explains that the true intent of the debtor and buyer to breach White's contract, instead of assuming it as they announced, and thus to put White's property interest at issue, was not announced by them until two months after the sale, well after White's time to appeal the sale order had expired.

The Trustee seems to be in some confusion whether the First Circuit Court of Appeals actually ruled on the merits of White's 60(b)(4) motion. In footnote 9 of the Trustee's brief the Trustee claims the Circuit Court's Judgment states only that the panel considered the record and read the briefs of the parties. However, the Judgment is clear that the Appeals Court considered and agreed with the bankruptcy court's ruling on the merits of White's 60(b)(4) motion:

> We affirm the judgment of the bankruptcy court, essentially for the reasons given in order and the memorandum of decision, dated May 9, 2006. We add only the following.
>
> The record indicates that White was given prior notice of the sale of debtor's assets and the opportunity to challenge that sale. Hence, any claim that the sale violated his right to due process is without foundation.

White's 60(b)(4) motion, appeals thereof, and instant petition all clearly argue that the debtor and buyer violated their notice of the sale by announcing they were assuming White's contract 4 days prior to the sale and then rejecting White's contract two months after the sale[1], and such faulty notice clearly violates procedural due process. Additionally, White's substantive due process challenge to the sale, leveled in his 60(b)(4) motion, on appeal, and in White's petition clearly accuses the sale of offending the conscience of justice, and this substantive due process challenge includes White's "absolute priority" rule challenge as well as White's 5th Amendment "public purpose" challenge. White believes the "property interest" requirement in §363(f) and §363(e) make it difficult for a party without a property interest in the debtor's assets sold to challenge a §363 sale on procedural or substantive due process grounds; ie.,

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1. Bankruptcy Court docket # 782, April 25, 2006 transcript White's motion to vacate hearing, pg.2:ln.21 – pg.4:ln.7.

White's property interest allow such a challenge.

The Trustee also argues that many of White's issues are duplicative of issues White previously raised in other motions and appeals; however, in an conflicting revelation in footnote 11 on page 25 of the Trustee Brief the Trustee admits that White's property interest and due process challenges are being raised for the first time in this instant appeal. Maybe the Trustee only means that White failed to properly preserve these issues in the bankruptcy court; however, White clearly argued his property interests and the faulty notice and due process violations at the hearing on his motion to vacate.

The Trustee also argues that White's petition does not present a compelling reason why certiorari should be granted by this Court, as prescribed and required under Sup. Ct. R. 10. White simply offers that no US Supreme Court decision has ever addressed the important Federal questions White raises concerning the Bankruptcy Code, which are: 1) whether a nonexecutory contract is automatically converted to a prepetition claim and therefore excluded from consideration under 11 U.S.C. §§ 503 and 363(f), 2) whether the "absolute priority" rule applies to a contested nonplan sale, 3) whether the 5th Amendment is offended by a perjurious buyer at a §363 sale, and 4) whether the bankruptcy court must issue an order to show cause prior to issuing a prefiling injunction against a pro se litigant, and/or hold a hearing addressing only that injunction. White also argues that the judge and not the opposition must explicitly warn the pro se litigant of the impending injunction.

Finally White points out that his appeal of his administrative expense application and appeal of the injunction do not suffer from a lateness challenge or ruling. White also points out that the bankruptcy

court never held a hearing on White's administrative claim. Evidently the bankruptcy court felt confident enough that all nonexecutory contracts are exempt from administrative priority, regardless of the terms of those contracts, that the bankruptcy court denied White his statutory opportunity to prove his claim. Unfortunately, that self made rule comes from the erroneous logic in ***In re FBI Distribution Corp.***, 330 F.3d 36, (1st. Cir. 2003):

> Under a nonexecutory contract, in which the nondebtor owes no future performance, the nondebtor provides no consideration "after the commencement of the case," and thus is not entitled to priority.

Such a sweeping and unconditional rule is not supported by the Bankruptcy Code or by the facts of this case. The postpetition debtor's choice to exercise terms and generate revenue permitted under White's nonexecutory software royalty contract clearly benefited the estate, making royalties due under White's contract subject to administrative priority.

Wherefore the above reasons, and for reasons presented in White's writ of certiorari, White's writ should be granted.

Respectfully submitted on this 28th day of February, 2008, by Robert White – pro se.

Robert White – pro se